1967

E. L. Gear And Fern Bate Gear v. Robert H. Davis : Appellant's Brief

In the Supreme Court of the State of Utah

E. L. GEAR and FERN BATE GEAR, husband and wife,
Plaintiffs and Respondents,

vs.

ROBERT H. DAVIS,
Defendant and Appellant.

CASE NO. [illegible]

APPELLANT'S BRIEF

Appeal from the Judgment of the Fourth Judicial District Court in and for [illegible] State of Utah
HONORABLE MAURICE HARDING, [illegible]

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INDEX

CASES CITED

TEXTS CITED

In the Supreme Court of the State of Utah

E. L. GEAR and FERN BATE GEAR, husband and wife,
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vs.

ROBERT H. DAVIS,
Defendant and Appellant.

CASE NO. 10895

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

Plaintiffs filed an action upon the theory of tort, obtaining money by fraudulent representation. Defendant answered that on the 16th day of July, 1965, the defendant was duly adjudged a bankrupt, under the acts of Congress relating to Bankruptcy, by an Order made and entered in the District Court of the United States for the District of Colorado, and the defendant having complied with all the requirements of the law in that respect, it was thereafter ordered by said Court discharged from all debts and claims proveable by said Acts against his estate, and which existed on the 16th day of July, 1965, on which day

the petition for adjudication was filed by the defendant, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy. Defendant claims that none of the acts complained of are proved, in law sufficient to except the debts sued on from discharge of bankruptcy.

DISPOSITION IN LOWER COURT

The matter was set for trial, and after hearing, the Court, sitting without a jury, found that on April 10, 1964, the defendant was made aware of the precarious financial situation of the business in which he was engaged and from which he would have to look to repay any funds that he might borrow; that he did not reveal to the plaintiffs any of the circumstances that rendered his situation precarious, but kept it concealed from them by active representation concerning the prosperity and stability of the business and his ability to pay any sums by him; that all sums borrowed from the plaintiffs borrowed after such date, totaling $23,400.00 were obtained by fraud, and are excepted from discharge in bankruptcy; that the sum of $3,600.00 is awarded as attorney fees in this matter, making a total judgment in favor of the plaintiffs and against the defendant of $27,000.00.

Findings of Fact and Conclusions of Law were entered substantially in conformance with the memorandum decision.

RELIEF SOUGHT ON APPEAL

Appellant seeks the reversal of the judgment of the Lower Court against Appellant, Robert H. Davis.

STATEMENT OF FACTS

That during all times material in this action, defendant was the president of Mountain Motors, Inc., A Utah Corporation, also known as, Provo Studebaker Company, and was the manager and operator of the corporation's Studebaker automobile agency in Provo, Utah.

That plaintiffs loaned to defendant the following sums of money on or about the dates indicated:

November 24, 1961	$ 5,000.00
July 15, 1962	$ 5,200.00
July 22, 1963	$ 5,000.00
February 22, 1964	$ 4,495.25
April 14, 1964	$ 5,000.00
May 20, 1964	$ 6,500.00
July 9, 1964	$ 6,900.00
August 11, 1964	$ 5,000.00
TOTAL	$43,096.25

That promissory notes were made, executed and delivered by defendant to the plaintiffs covering each of said loans, and upon at least one occasion, to-wit, on or about May 25, 1964, defendant consolidated and renewed the loans which were then outstanding by the execution of a new promissory note in the amount of $25,000.00, and at that time the then outstanding notes were destroyed.

That at the time of the consolidation in May of 1964, when defendant was asked for security, defendant informed plaintiffs that he had no security to give them but that he would obtain a term insurance policy for their protection in the event of his death. That all of the notes prior to

May 20, 1964, given by Mr. Davis to the Gears, were intentionally returned to Mr. Davis and cancelled (R. 52).

That in addition to the foregoing, plaintiffs purchased 100 shares of capital stock of Mountain Motors, Inc., for the sum of $12,500.00 from the defendant herein on or about September 25, 1963, and paid for said stock the sum of $7,450.00 by their check and $5,050.00 by cancellation of defendant's promissory note payable to plaintiffs dated July 22, 1963, in the amount of $5,000.00; that on or about January 9, 1964, plaintiffs purchased from defendant an additional 10 shares of capital stock of Mountain Motors, Inc., and paid therefor the sum of $1,250.00.

That Robert H. Davis ceased being the manager and president of Mountain Motors, Inc., December 7, 1964, at a time when the corporation had a net worth of $76,532 (R. 137). Shortly thereafter in January of 1965, plaintiff, E. L. Gear, a Mr. Weight, a Mr. Ross Fazzio, a Mr. Austin Chiles, a Mr. Roxie Childs, and the Olivers commenced running Mountain Motors, Inc. (R. 166). Plaintiffs E. L. Gear and Fern Bate Gear, husband and wife, continued to loan money to the corporation "Mountain Motors" in 1965, after defendant, Robert H. Davis, had left the corporation. (R. 68).

That on or about July 16, 1965, defendant was adjudicated a bankrupt on a petition filed by him in the District Court of the United States for the District of Colorado, Denver, Colorado; that the indebtedness of defendant to plaintiffs referred to above was duly scheduled for discharge; that on or about February 24, 1966, the United States District Court for the District of Colorado made and entered an order discharging defendant from all prove-

able claims and debts, except debts excepted by the Bankruptcy Act from the operation of a discharge in bankruptcy.

That in or about the month of February, 1964, partially because the Studebaker Company had moved its automobile manufacturing business to Canada, the sales of automobiles by Mountain Motors, Inc., dropped from between 25 to 30 per month to about 2 per month; that repossessions of previously sold automobiles by Mountain Motors during February and March, 1964, increased at an unprecedented rate; that on or about April 10, 1964, defendant was informed by his accountant and knew that the business of Mountain Motors, Inc., had lost approximately $22,000.00 in the previous six (6) months. That defendant did not inform plaintiffs of this fact.

That at no time did plaintiffs ever request a financial statement from defendant, and none was given.

Plaintiffs testified and the court so found that on or about April 14, 1964, defendant stated to plaintiffs that he wanted to buy the stock of Mountain Motors, Inc., owned by Chester and Mabel Oliver; that the business of Mountain Motors was very good, and that it was in sound financial condition; that if he owned the stock which was then owned by the Olivers he would be able to save Mountain Motors, Inc., about $1,300.00 each month since he was paying that much to them; that on or about May 20, 1964, defendant, in substance and effect, repeated said statement, and assured plaintiffs that there was no chance at all of losing their money. That on or about July 9, 1964, defendant stated to plaintiffs that he wanted to buy stock owned by Ross Fazzio in Mountain Motors, Inc., because

Ross Fazzio was demanding equality in the business and was interfering with its operation. That on or about August 11, 1964, defendant stated to plaintiffs that he wanted to borrow $5,000.00 in order to pay off the back part of the property then being occupied by Mountain Motors, Inc., and that he would then rent it back to the corporation for the sum of $750.00 per month.

That although plaintiff, E. L. Gear. was a member of the Board of Directors of Mountain Motors, Inc., he was not notified of any directors meetings and did not attend any of said meetings.

ARGUMENT

POINT I

THERE WAS INSUFFICIENT EVIDENCE FOR THE COURT TO HOLD THAT AS TO ALL SUMS BORROWED BY THE DEFENDANT FROM PLAINTIFFS AFTER APRIL 10, 1964, WERE EXCEPTED FROM DISCHARGE IN BANKRUPTCY.

Plaintiffs complained that on April 14, 1964, May 20, 1964, and July 9, 1964, defendant made misrepresentations as to the financial condition of Mountain Motors, Inc. (Amended Complaint paragraph 2 and 3).

Plaintiffs further complained that on August 11, 1964, defendant misrepresented what he intended to do with the money borrowed.

Two issues of law are presented as to the effect of the misrepresentation as found by the Court: (1) Does Section 17a(2) of the Bankrupty Act require that false or fraudulent statements of financial condition be in writing

before the plaintiff can assert this section of the Act; and (2) does a promise to use money in a particular manner constitute fraud if the money is used otherwise?

(1) Prior to 1960, Section 17a(2) did not include the statement concerning false financial statements, but Section 14c(3) did have this statement. S. Rep. No. 1688, 86th Cong., 2d Sess. 1 (1960) sets out the reasons for making the change. It appears that Congress was concerned that although the purpose of the Bankruptcy Act was to protect debtors, finance companies were inducing people to borrow and in doing so, were requiring the borrowers to fill out financial statements which were tricky and which only the most observant could fill out correctly. Then, if the debtor subsequently filed for bankruptcy, the creditor could object in the bankruptcy court to discharge of this obligation by asserting that credit was extended on the basis of a false financial statement.

Therefore, in 1960, Congress changed Section 14c(3) so that it applied only to businessmen; however, this opened the field too wide, therefore they adopted exactly the same language into Section 17a(2). This meant, that in fraud cases, thce creditor would at least have the possibility of bringing an action in the state court (however, the burden of proof would now be shifted to the plaintiff). This is the way the Bankruptcy Act stands today.

Since 1960 there have been at least three cases deciding the exact issue of whether the statement of financial condition had to be written to preclude the defendant from asserting discharge:

(a) Sears, Roebuck & Co. v. Sofio, 138 So. 2d 616 (3) (La. Ct. App. 1963). In this case, the Court said:

"The credit manager of plaintiff, testified that he asked defendant if he owed any other debts and that defendant answered that he did not. Defendant denies positively that any such question was asked of him and says that he made no representation on the subject. (He did owe other debts.) We are not required to resolve that dispute, for the reason that the language of the bankruptcy law is explicit in the requirement that to prevent the discharge of a debt, the false statement by the debtor as to his financial condition must be in writing."

(b) Dial Finance Co. v. Duthu, 188 So. 2d 151 (La. Ct. App. 1966). In this case, the court said that even "an intent to deceive without a written false [financial] statement will not except the debtor under this section of the statute." (Id. at 156).

(c) Friendly Finance Discount Corp. v. Haydn, 171 So. 2d 717 (La. Ct. App. 1964). The court, in this case, held that there was discharge under Section 17a(2) even though there was a financial statement which was written. The reason stated by the court was that plaintiff did not rely on the written statement, but rather, on other oral statements made by the defendant concerning the defendant's financial condition, and these statements were not set down in writing as required by the statute.

Also, since 1960, there have been several cases stating that the representation of financial condition must be in writing, but because there, in fact, were written financial statements, the courts have held that there should be no discharge.

E. g., Midland Discount Co. v. Robichaux, 184 So.2d 93 (La Ct. App. 1966), in which the court stated:

"Before those pertinent provisions of Section 71 can prevent the bankrupt from being released by the discharge in bankruptcy, it is incumbent upon the plaintiff to show that: (1) plaintiff advanced the loan in reliance upon a financial statement made by the defendant . . ." (Id. at 96).

Cash Finance Service, Inc. v. Haisch, 173 So.2d 851 (La. Ct. App. 1965), where the court said:

"Before the . . . provisions [11 U.S.C. Sec. 35a(2) (1964)] can be applicable we deem it incumbent upon the plaintiff to show: (1) that plaintiff granted the extension or renewal in reliance upon a written financial statment made by the defendant . . ." (Id. at 853).

Household Finance Corp. v. Altenberg, 5 Ohio St.2d 190 214 N.E.2d 667 (1966), in which the court said:

"A discharge in bankruptcy does not relieve a defendant from liability on his promissory note, where the debt for which the note was given was created in reliance upon a materially false statement in writing by such defendant for the purpose of obtaining such credit from plaintiff."

Two other cases saying generally the same thing are, Household Finance Co. v. De Shazo, 359 P.2d 1044, 1046 (Wash. 1961); and First Credit Corp. v. Wellnitz, 21 Wis. 2d 18, 123 N.W.2d 519 (1963).

Because the language in Section 17a(2) is adopted directly from Section 14c(3), the construction which has historically applied to the latter section should now apply to Section 17. For an interpretation of the phrase "in

writing" see the cases cited in Collier, Bankruptcy 1387, n.3 (14th ed. 1966). From these cases, it is obvious that this section did not give a plaintiff grounds for objection to discharge on mere false oral statements of financial condition. The statement had to be written.

As to the alleged false statements made by defendant to induce the plaintiffs to act in this case:

The statement made by Davis to Gears that he wanted to buy the stock of Mountain Motors, Inc., owned by Chester and Mabel Oliver; that there was no chance at all of losing their money; that he wanted to buy the stock owned by Ross Fazzio in Mountain Motors, Inc., because Ross Fazzio was demanding equality in their business and was interfering with its operation; that he wanted to borrow $5,000.00 in order to pay off the back part of the property then being occupied by Mountain Motors, Inc., and that he would then rent it back to the corporation for the sum of $750.00 per month; are statements of futurity and promises.

The general rule, which is supported by numerous decisions in almost all American and British jurisdictions, is that fraud must be related to the present or pre-existing fact, and cannot ordinarily be predicated upon representation or statements which involve mere matters of futurity or things to be done or performed in the future. See 23 Am Jur 35:794; 17 A.L.R.2d 1208 (37); 139 P. 986 (44); Adamson, et ux. vs. Brockbank, 185 P.2d 264 (49); Marlin vs. Drury, 228 P.2d 803 (60); Pace vs. Parrish, 247 P.2d 273 (63).

CONCLUSION

The evidence in this case is insufficient to support a finding of fraud sufficient to except the debt from the discharge in bankruptcy under Section 17a of the Federal Bankruptcy Act. Any statement as to financial condition must be in writing, and the statements of the defendant in this case, other than as to his financial condition, are statements of futurity and promises not sufficient to except the debt from discharge in bankruptcy.

The judgment should be set aside and judgment entered for defendant.

Respectfully submitted,

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